No. 84-12

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IN THE

Supreme Court of the United States

October Term, 1984

ADONIOUS COLEMAN,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Petitioner Adonious Coleman seeks a writ of certiorari to review a June 2, 1983, order of the Appellate Division, First Department, of the New York Supreme Court. That order affirmed, without opinion, a September 17, 1979, order of the New York Supreme Court, New York County, convicting petitioner, after a jury trial, of Criminal Possession of a Controlled Substance in the First Degree (New York Penal Law §220.21), and sentencing him to from fifteen years to life imprisonment.

Statement of the Case

On September 25, 1977, at approximately 2:00 a.m., two officers of the New York City Police Department observed petitioner, in the midst of a heavy rainstorm, lingering suspiciously behind a parked van. Upon observing the officers, petitioner fled. The officers pursued and, during the chase, petitioner attempted to conceal behind a parked car a bag containing over $15,000 worth of heroin. The drugs were recovered and petitioner was captured.

By Indictment No. 3981/77, petitioner was charged with one count of Criminal Possession of a Controlled Substance in the First Degree, an offense which upon conviction required imposition of a minimum prison term of from 15 years to life (Penal Law §70.00[3][a][i]).

On September 11, 1979, at a pre-trial hearing held before Justice Shirley Levittan of the New York State Supreme Court, counsel for petitioner moved to suppress the recovered narcotics and statements made by petitioner at the time of the arrest. On that date, the court denied the motion to suppress the drugs and granted the motion to suppress the statements.

Petitioner proceeded to trial before Justice Levittan and a jury on September 13, 1979. At trial, the officers who arrested petitioner testified regarding the events underlying petitioner's apprehension. A chemist employed by the New York City Police Department testified that the material recovered from petitioner was in fact heroin.

Upon the close of the People's case, petitioner's trial counsel argued in summation that the People's evidence failed to demonstrate beyond a reasonable doubt that petitioner had possessed the bag containing the recovered narcotics. Counsel also argued that even if the jurors found that petitioner had in fact possessed the heroin, the evidence at trial did not support the conclusion that he had knowingly possessed the narcotics but rather that he had recently stolen the drugs from the van behind which he had been lingering before his arrest. Accordingly, counsel argued that petitioner should be acquitted of the crime charged. Upon the conclusion of summations, the case was submitted to the jury and on September 17, 1979, petitioner was found guilty as charged.

On appeal to the Appellate Division, First Department, petitioner argued that the proof of his guilt was insufficient to support the verdict. Petitioner also argued that he was denied his sixth amendment right to the effective assistance of trial counsel. Specifically, petitioner asserted that his counsel had failed to pursue certain lines of defense and had failed to call witnesses who would have testified regarding petitioner's good character. Petitioner also argued that counsel had inadequately prepared and that he had improperly prejudiced petitioner by suggesting on summation that petitioner had committed a theft on the night of his arrest.

By an order dated June 21, 1983, the Appellate Division unanimously and without opinion affirmed petitioner's judgment of conviction. 95 A.D.2d 984. On November 15, 1983, the New York State Court of Appeals, denied leave to appeal. 60 N.Y.2d 965 (Cooke, Ch. J.).

In this application, petitioner continues to assert that he was denied the effective assistance of counsel, by virtue of his trial counsel's inadequate preparation, his failure to call character witnesses and his advancement of the defense that petitioner was, at most, guilty of theft. Petitioner argues that this Court should review trial counsel's performance in order to articulate a standard by which criminal defense counsel's performance should be judged under the sixth amendment and to thereby resolve a dispute among the federal circuit courts as to that standard.

Reasons for Denying the Writ

Generally, this Court will grant a petition for a writ of certiorari only where there exists a split among the federal appellate courts as to a particular issue, or where novel questions of constitutional dimension or national import are raised. *See, e.g., Davis* v. *Alaska,* 415 U.S. 308, 315 (1974); *Katzinger* v. *Chicago Metallic Mfg. Co.,* 329 U.S. 394 (1947). *See generally,* Stern & Gressman, *Supreme Court Practice,* §4.27, pp. 315-17 (5th ed. 1978). As the discussion below demonstrates, petitioner's application should be denied since there is no dispute among the federal circuit courts regarding the legal principles governing his state appeal. Moreover, petitioner's contention that he personally was denied the effective assistance of counsel is meritless and, in any event, does not present a question of national interest or constitutional import.

1. Any Conflict Among The Federal Circuit Courts Regarding The Constitutional Standard For Effective Assistance Of Counsel Has Already Been Resolved By Decisions Of This Court And The Second Circuit.

Petitioner asserts that a writ of certiorari should be granted in order to resolve "[t]he clash amongst the Circuits" regarding the constitutionally mandated standard of competence for defense counsel in criminal trials (Petition for a Writ of Certiorari, p. 27).

True, until recently the Second Circuit applied the "farce and mockery" standard to determine whether assistance of counsel at a criminal trial was "effective," while the remaining Courts of Appeal applied a standard of "reasonable competence." *See United States* v. *Bosch*, 584 F.2d 1113, 1120-21 (1st Cir. 1978); *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *Moore* v. *United States*, 432 F.2d 730, 737 (3rd Cir. 1970); *Marzullo* v. *Maryland*, 561 F.2d 540, 543-44 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); *Caraway* v. *Beto*, 421 F.2d 636, 637 (5th Cir. 1970); *Beasley* v. *United States*, 491 F.2d 687, 696 (6th Cir. 1974); *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 641 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); *United States* v. *Easter*, 539 F.2d 663, 666 (8th Cir. 1976); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1329 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980); *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981); *United States* v. *DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

However, the Second Circuit's recent adoption of the requirement that counsel in criminal cases exhibit reasonable competence resolves any dispute among the Circuits. *Trapnell* v. *United States,* 725 F.2d 149 (2d Cir. 1983). *See also, Fiumara* v. *United States,* 727 F.2d 209, 214 (2d Cir.), *cert. denied,* —— U.S. ——, 104 S. Ct. 2154 (1984); *United States* v. *Dukes,* 727 F.2d 34, 41 (2d Cir. 1984).

In any event, even in the absence of the agreement among the Circuits, there would be no reason for this Court to address the question of the proper standard for judging criminal defense counsel's performance, since it has recently done so, concluding that that standard is one of reasonable competence. *Strickland* v. *Washington.* —— U.S. ——, 104 S.Ct. 2052 (1984).

Thus, the dispute among the Circuits has been resolved and whatever ambiguity may have existed regarding this Court's interpretation of the constitutionally mandated standard of competence for defense counsel has also been clarified. There is, therefore, no pressing or constitutionally significant issue to be resolved in this case.

2. The Standard Followed By The New York State Courts And Applied In Evaluating Petitioner's Claim Of Ineffective Assistance Of Counsel Conforms With That Followed In The Federal Courts.

Not only is there no need to resolve a dispute among the federal circuits concerning the standard of competence of criminal defense counsel, but there is no need to resolve a dispute between that standard and the standard actually applied by the state courts in this case.

The New York state courts, well before the Second Circuit's abandonment of the farce and mockery standard, had rejected that standard and concluded that counsel in criminal cases must exhibit at the minimum reasonable competence. *People* v. *Aiken*, 45 N.Y.2d 394, 400-401 (1978); *People* v. *Droz*, 39 N.Y.2d 457 (1976); *People* v. *Sellars*, 74 A.D.2d 551 (1st Dept. 1980); *People* v. *Jackson*, 74 A.D. 2d 585 (2d Dept. 1980). Moreover, in recent years the New York Court of Appeals has signaled its willingness to provide even greater scrutiny of claims of ineffective assistance of counsel than that required under the reasonable competence standard, and to ascertain whether counsel's performance was "adequate or effective in any meaningful sense of the words." *People* v. *Aiken*, 45 N.Y.2d at 398.

In reviewing petitioner's claim that he was denied the effective assistance of counsel the state courts applied a standard conforming, at the very least, with that mandated by the federal courts. Indeed, petitioner's primary reliance on New York state authority, in support of his claim that he was denied the effective assistance of counsel, only underscores the state's sensitivity to such claims (See, e.g., Petition for a Writ of Certiorari, pp. 17-18, 22-24).

Thus, review of this case would not resolve any discrepancy between the federal standard for effectiveness of counsel and that adopted by New York State.* And even if a dispute on the issue existed among the Circuits, the test employed by the New York courts was the one that was

* Petitioner alludes to certain authority from other jurisdictions finding that retained counsel is subject to a lesser standard of competence than assigned counsel. The New York state courts have never drawn such a distinction. *People* v. *Aiken*, 45 N.Y.2d at 401. In any event, petitioner was represented by assigned counsel and his performance could, therefore, not have been judged under any more lenient standard than that of reasonable competence.

most beneficial to petitioner. Obviously, then, petitioner has simply presented a hypothetical controversy for this Court's review.

3. The Record In The State Court Does Not Raise The Question Presented In The Petition.

Even if petitioner asserted some constitutional issue deserving resolution by this Court, this case would not be an appropriate vehicle for that resolution.

Where the record does not clearly and specifically present a petitioner's claim and an evidentiary hearing would be needed to ascertain whether there is any basis for his factual allegations, a writ of certiorari should not be granted. *See, Johnson* v. *Massachusetts,* 390 U.S. 511 (1968); *Massachusetts* v. *Painten,* 389 U.S. 560, 561 (1968). Here, the question presented by petitioner would require such an evidentiary hearing, for it consists primarily of a series of factual allegations either not presented in, or refuted by, the state court record.

The record provides no suport for petitioner's assertions that "consultation before trial consisted of a single twenty minute meeting, no potentially helpful character witnesses were interviewed, no visit to the scene of the arrest was made, [or that] no factual investigation of events prior to defendant's arrest was made . . ." (Petition for a Writ of Habeas Corpus p. 1). Indeed, the record specifically refutes petitioner's assertion that "no defense was interposed." *Id.* Thus, before the Court could even evaluate petitioner's claims it would have to order a lengthy evidentiary hearing—a course the Court has consistently declined to take.

4. The State Court's Conclusion That Petitioner Was Not Denied The Effective Assistance Of Counsel Presents No Issue Meriting Review By This Court, And, In Any Event, Was Correct.

Finally, assuming that petitioner's contentions could be evaluated on this record, the petition should still be denied.

Shorn of surplusage, the petition for a writ of certiorari consists of nothing more than a lengthy argument that the New York state courts, while applying a standard of review conforming with that mandated by the Constitution, incorrectly concluded that petitioner had not been denied the effective assistance of counsel. Such a claim, even if meritorious, simply does not demonstrate that the case is of such national significance or constitutional import as to justify this Court's scrutiny. *See, e.g., Davis* v. *Alaska,* 415 U.S. 308, 315 (1974); *Magnum Co.* v. *Coty,* 262 U.S. 159, 163 (1923). *See also,* Stern & Gressman, *Supreme Court Practice,* §4.2, pp. 257-59 (5th ed. 1978). Moreover, even if the state court's ruling merited review, the petition should be denied, since petitioner has failed to make a threshold showing that his rights were violated or that the state court's ruling was incorrect.

Simply put, petitioner's entire challenge is a further expression of his post-trial dissatisfaction with his counsel's advancement of the defense that petitioner was at worst a mere thief who had unknowingly stumbled upon a cache of narcotics. The assertion of one specific defense should not raise a question of national import. In any event, the advancement of that defense, at petitioner's trial, did not violate his sixth amendment right.

Defense counsel was faced with a scenario in which the testimony of two police officers and a police chemist un-

equivocally linked his client to a cache of heroin with a street value in excess of $15,000. The only rational course to take in defending petitioner was to assert that he did not "knowingly" possess the drugs. While the jury quite properly rejected this defense, it cannot be said that petitioner was prejudiced by virtue of its advancement. No alternative defense was suggested by the record. Counsel's argument that his client may have been guilty of a crime, but not the crime with which he had been charged, carried far greater verisimilitude than the unsupported and shop-worn claim, asserted in petitioner's state appeal, that he was totally innocent and nothing more than the victim of some massive police conspiracy. (*See* "Brief and Memorandum of Law" in support of petitioner's appeal in the New York State Appellate Division, pp. 20-21). Moreover, conceding that petitioner might be a thief could hardly prejudice the defense, since there was no larceny charge before the jury on which petitioner could be convicted, and, if there had been, it would not have carried the life sentence of the drug possession charge.

Nor was petitioner prejudiced by his attorney's failure to call the character witnesses alluded to in his petition, since such a course would only have permitted the People to elicit evidence of his prior arrests and convictions. *United States* v. *Bermudez,* 526 F.2d 89, 95 (2d Cir. 1975), *cert. denied,* 425 U.S. 970 (1976); *People* v. *Kass,* 25 N.Y. 2d 123 (1969); *People* v. *Beaulieu,* 40 A.D.2d 942 (4th Dept. 1972).*

* The New York State Board of Corrections pre-sentence report on petitioner indicates that prior to his arrest for the possession of heroin, petitioner had been convicted as a youthful offender and had been arrested at least ten times for offenses including possession and sale of narcotics, weapons possession, disorderly conduct, possession of stolen property and unauthorized use of a vehicle.

In sum, petitioner has cited no fact that would rebut the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland* v. *Washington,* 104 S.Ct. at 2066. Indeed, the state court correctly concluded that petitioner was not denied the effective assistance of counsel. That determination forms no basis for further review by this Court.

Conclusion

The petition for a writ of certiorari to the New York State Court of Appeals should be denied.

Respectfully submitted,

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